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THE RIGHT OF PRIVACY.

"Several glaring illustrations have of late been furnished of the amazing opinion of Judge Parker of the Court of Appeals of this State, that the right to privacy is not a right which in the State of New York anybody is bound to respect, or which the courts will lend their aid to enforce. We happen to know that that decision excited as much amazement among lawyers and jurists as among the promiscuous lay public.

"The present President of the United States has been so much annoyed by photographers who have attended his down-sittings and his uprisings and spied out all his ways, for the purpose of making permanent pictorial record of the same, that it is reported that only his respect for the dignity of his office has upon one or two occasions prevented him from subjecting the impertinent offender to the appropriate remedy, which is all that the Court of Appeals has left, of personal chastisement.

"Mr. J. Pierpont Morgan, we read, was so beset by 'kodakers' lying in wait to catch his emergence from his office on the day of his return from Europe that he was actually held a prisoner for some time.

"Both the President of the United States and so very leading a figure in the industrial and financial world as Mr. Morgan are necessarily public characters. Moreover, they are reasonably thick-skinned citizens who do not partake the characteristics of the shrinking violet. When they revolt from the continuous ordeal of the camera, it is shown that there is something very irritating to normal nerves in chronic 'exposure.'

"But take the case of that young woman in Newport whose portrait was flaunted in all the illustrated newspapers for no other reason than that she had at one time been betrothed to a young gentleman who committed suicide in circumstances necessarily very painful and horrible to her, and rendered far more so by this wanton invasion of her privacy and her grief. If that young woman had happened to be the daughter of Judge Parker, we are of the opinion that the incident might have induced his Honor to reconsider with some care the decision that no private person had any rights which the purveyors of publicity were bound to respect.

"In this series of events we can see political evolution at work. We can see the effect of public opinion upon law and institutions in the making. For all these things appeal to the decent and unsophisticated human mind as outrages. And the highest legal authority in the greatest State in the Union assures us that they are outrages for which the law provides no remedy. So much the worse for the law say all the decent people. If there be, as Judge Parker says there is, no law now to cover these savage and horrible practices, practices incompatible with the claims of the community in which they are allowed to be committed with impunity to be called a civilized community, then the decent people will say that it is high time that there were such a law. In some way they will see to it that there is such a law, and the Court of Appeals will not be left to shadowy analogies and precedents for its conclusion that these outrages are legally unpreventible and unpunishable. It will have the advantage of a clear and explicit statute to construe."

The above article is copied from the *New York Times* of August 23d. The case that is rather unfavorably criticised in the article is Roberson *v.* Rochester Folding Box Company[1]. When such a well-informed and conservative journal, that is so generally fair and reasonable in the discussion of public questions, gives us such an inaccurate idea of what a case actually decides, and such an erroneous, not to say extravagant, version of the reasons upon which the decision rests and of the consequences to follow from it, we may assume that the press is not always a safe guide for either the bar or the public upon legal questions or with respect to the real scope and effect of judicial decisions. It is perhaps not surprising that the comments of the press upon the decisions of the courts should so frequently be found inaccurate and misleading since it generally occupies in the discussion the position of an advocate rather than a judge. In the zeal to denounce wrong and injustice and to promote reform it frequently fails to give any adequate notion of what the wrong is, if any, or the remedy to be applied.

This generation has not yet entirely forgotten how a decision of the highest court in the land was distorted in the heat of public discussion, in the press and upon the hustings. It is quite probable that a majority of the people of the country at one time were persuaded and honestly believed that the court had decided that a negro had no rights that a white man was bound to respect, whereas it decided

[1] 171 N. Y. 538.

nothing of the kind, and that is now the verdict of history. What it did decide was that a certain colored man was not a citizen and the majority of the same court has just approved of the decision in its application to the Filipinos[1]. If the millions of people who inhabit our insular possessions are not citizens it would be difficult to show that there is any flaw in the decision of the court, made nearly half a century ago, to the effect that Dred Scott was not a citizen. But this is only a digression intended to illustrate the instability of public opinion upon such questions. A decision which is made to appear to-day to be unjust and absurd may be approved of to-morrow as the perfection of justice and human reason. If it is based upon correct principles which have been recognized as safe and sound by the courts in all ages, it will be quite sure to withstand the waves and weathers of time and to survive any temporary clamor for new experiments by the courts or by the legislature.

The case referred to in the above article was that of a young woman whose picture was made use of by the defendant and circulated upon a card for advertising a brand of flour. If it was simply a question whether this was an impertinent act on the part of the defendant, all right-minded men would at once agree that it was. But there are many impertinent and disagreeable things which one may suffer from another that do not amount to legal injuries such as courts may redress. If the use of this young woman's picture was a legal injury at all, it was either an injury to her person or to her character. We may discard entirely the suggestion that a lady has any thing in the nature of a property right in her form or features that is invaded by the circulation of her picture against her will or without her consent. That would be altogether too coarse and too material a suggestion to apply to one of the noblest and most attractive gifts that Providence has bestowed upon the human race. A woman's beauty, next to her virtues, is her earthly crown, but it would be a degradation to hedge it about by rules and principles applicable to property in lands or chattels. The Court did not decide that the right of privacy in this State was something that no one was

[1] Downes *v.* Bidwell 182 U. S. 271.

bound to respect. There was no such question before the Court and no such question was involved in the case. What it did decide was that the plaintiff had not stated a case for the interference of a court of equity by the writ or process of injunction.

Injuries to the person or to character are redressed or prevented in two ways.. First, by the penalties and terrors of the criminal law, embodied in the Penal Code, and secondly, by civil actions at law for damages in which the facts, including the amount of damages, must be determined by the verdict of a jury. Whether the plaintiff had any remedy under the Penal Code or for damages at law was not passed upon at all for the plain reason that no such question was before the Court. The plaintiff did not invoke or seek any remedy of that kind. If the use by the defendant of the young woman's picture or portrait, as an attraction upon a card advertising flour, subjected her to contempt, ridicule or disgrace, the remedy was to invoke the law of libel, either in a criminal or civil court or both. The writ of injunction does not lie to prevent or punish a libel. The office of that process is to stay or prevent injuries to some property right, committed, threatened or contemplated. It is an extraordinary remedy that courts of equity resort to in certain cases that are now quite well defined and classified. In these times much has been said and written in denunciation of government by injunction, which means that in the opinion of many this extraordinary process, which can be enforced only by imprisonment, is now made use of by courts to restrict and subvert personal liberty. While it may be and probably is true that the courts have recently in some respects departed from the ancient landmarks in making use of the process, I am far from intimating that it has been improperly used. On the contrary, it will no doubt be found that the courts have simply applied settled principles to new facts and conditions and so long as the action of the courts is based upon legal or equitable principles it is no objection to the decision that the facts are novel. The general rule is that a man is responsible for any injury to person or property, or for any breach of his obligations or duties, in a judgment at law which is satisfied by the payment of money. The injunction

mandate can be made use of only in exceptional and extraordinary cases that come within the scope of some recognized principle of equity jurisprudence. The court that restrains an act by injunction in a case that does not fall within some such principle is guilty of usurpation and merits all the denunciation that has been aimed at government by injunction. The court that will not respect the limitations of the law upon its own powers will not long retain the respect of the people.

The act which the plaintiff complained of, namely, the circulation of her portrait by the defendant in the manner described, was committed of course before she applied for the injunction; and hence the mischief, if any, to her person or character was in a sense complete. All that an injunction could accomplish, under any circumstances, would be to restrain the further use of the picture, leaving the injury, if any, that had been inflicted upon her person or character unredressed. No reasonable man claims or can claim that the writ of injunction was ever before, in the whole history of equity jurisprudence, made use of for such a purpose. No one claims that there is any precise precedent that in the slightest degree tends to sustain such an exercise of power. The most that is claimed is that the defendant's conduct amounts to such a gross impertinence and violates all propriety in such a degree that there ought to be some remedy. There may be a remedy, but it is very clear it is not by injunction, and that is all the Court held. To hold otherwise, the Court would be obliged to usurp powers that it does not possess and to disregard adjudications in the highest courts of at least three States on the question that to every reasonable mind must be conclusive. It was held in this State that an injunction could not be granted to restrain an artist from making and exhibiting to the public at the Chicago fair a bust of a woman distinguished for works of charity and benevolence, although it was alleged by her relatives or descendants that it was in violation of the right of privacy, injurious to their feelings and the cause to them of mental distress. The point of the decision was that courts of equity are without power to interfere in such cases.[1] It was held in a still more recent case that a court

[1] Schuyler *v.* Curtis, 147 N. Y. 434.

of equity would not interfere by injunction to enjoin the employment of detectives to follow and watch a person, causing him annoyance and inconvenience, interfering with his social intercourse and business, and causing suspicions which damaged his financial credit. The remedy of a party complaining of such a violation of his rights is by a suit for damages in a court of law.[1] So it was held by the highest court of another State that a court of equity could not interfere by injunction against the use of the name and portrait of a deceased person on a cigar label. His widow brought the action alleging injury to her feelings and violation of the right of privacy, but the court held that such an injury was not one which the law can redress.[2] In these three cases the right of privacy was thoroughly discussed in various aspects as the ground of an action, and while it was admitted that it embodied an idea that was attractive to some minds, it was quite too fanciful for judicial recognition as a legal principle. Other cases might be referred to that tend in the same direction, but the three cases mentioned really embody the whole law on the subject. There are some cases to be found in the inferior courts that contain detached expressions of the judges to the effect that there ought to be some remedy in such cases. They are hasty and very general conclusions that are picked out from discussions in which the question was not really involved.

If the time should ever arrive when a judicial decision that rests so firmly upon sound principles and safe precedents can be regarded as the direful spring from which all the woes and evils described in the above article flow, our notions with respect to the proper duties and functions of the judge must be subjected to a radical change. It will then be his duty, instead of seeking to apply principles and precedents to ever-varying facts,to keep his ear to the ground or to watch the direction of the popular breeze. Fortunately no such result need be anticipated. The learning and conservative tendencies of the bar and the good sense of the people will prevail over any temporary errors that the press may commit. It will not be difficult for any reasonable mind to understand that such a picture as that

[1] Chappell *v.* Stewart, 82 Md. 323.

[2] Atkinson *v.* Dougherty, 121 Mich. 372.

outlined in the above article with respect to the scope and effect of a decision of the courts is very much overdrawn. It did not precipitate upon the President and Mr. Morgan a crowd of people with kodaks to invade their right of privacy. It is not at all likely that many of the crowd had ever heard of the decision, or if they had, that it in any degree stimulated their curiosity. Their action and their motives present nothing that is new. The masses of mankind have been accustomed, in all ages of the world, in some form or other, to pay homage to fame or to great success in any field of human exertion. It is not certain that our modern method of gratifying that curiosity, so natural in the human race, is any more reprehensible than it was before. Whatever there may be about it that is inconvenient, impertinent or disagreeable may be considered as a part of the penalty that in the nature of things is imposed upon all distinguished men who have reached the pinnacle of their earthly ambitions. Indeed, the cases are rare when public applause and the homage of the people, however manifested, becomes disagreeable to the subject of it. There may be a few that are inclined to shun it, but the majority court it. There were but very few Romans who refused a triumph when the public decreed it. It may be that the two eminent gentlemen referred to in the article who have reached the mountain ranges of fame may be specially afflicted in the manner suggested, but if so, there are so many ways in which they can avoid or suppress the intrusion and take care of themselves that it is obvious that the case furnishes no ground for either judicial or legislative action. It is not at all likely that any sane lawyer will advise them to proceed by injunction against the curious people, individually or collectively, who are seeking to invade their right of privacy in defiance of good taste and good manners. Nor is there the slightest reason to believe that either of them would be inclined to follow such advice if given. They would, doubtless, decide to endure all the ills that they have rather than fly to others that they know not of. The attentions that they receive are in some sense the expression of the public judgment that neither of them is inclined to bury his talent in the ground or to put his candle under a bushel.

The case of the young lady at Newport is undoubtedly a painful one, but there is nothing new about it. Such tragedies always bring pain and suffering to some one. The relatives of the unfortunate young man are perhaps more deeply afflicted than any one else, but the publicity that is and always has been given to all the harrowing details of such a calamity can not be prevented by the decree of a court of equity. The right of privacy in such cases, if it exists at all, is something that can not be regulated by law. The rules for the regulation of human conduct with respect to the courtesies and proprieties of life and that enjoin that delicate regard for the feelings and sensibilities of others are not to be found in statutes or judicial decisions. They may be and probably are violated by the use of pictures or photographs to sell newspapers or to sell flour, but the practical question is whether such devices for stimulating business and making money can be regulated by law without doing more harm than good. In principle there can be no distinction made between the use of a photograph of a young woman on a card for advertising a particular brand of flour and the photograph of a man on a cigar box for advertising a particular brand of cigars. In both cases the act of the advertiser is the same, and a law that would forbid the former and permit the latter would be an unjust law. But we are not yet so far removed from the days of chivalry as to warrant the belief that the popular impulse would not call for a distinction in the two cases. It is perhaps natural enough for the average man to say when told that the photograph of a young girl was used for the purely commercial purpose of advertising a brand of flour, that if there is no law to prevent such a thing there ought to be one. This, however, would be only a hasty opinion formed without any conception of the difficulties inherent in such a problem. In the first place he forgets that courts do not make new laws, but enforce those that exist. They have no legislative power. Whenever new laws become necessary to suppress some evil, resort must be had to the legislature. It is not always easy to ascertain what, if anything, public opinion demands in that respect. It is only a short time since a bill was introduced into the senate of this State and passed for the very purpose of prohibiting

the use of pictures and photographs without the consent of the person represented. That bill would have covered every case referred to in the above article, but it was the most unpopular bill that had made its appearance in the legislature for many years. The opposition of the press not only defeated the bill, but went so far as to demand the retirement of its author to private life.

The right of privacy, so called, represents an attractive idea to the moralist and social reformer, but to the law-maker, who seeks to embody the right in a statute, the subject is surrounded with some serious difficulties. It is quite impossible to define with anything like precision what the right of privacy is or what its limitations are, if any; how or when the right is invaded or infringed, or what remedy can be applied if any. Every one is entitled to the equal protection of the laws and all statutes for the regulation of human conduct should be made to operate upon all alike and to protect all alike. It is not practicable to make one law on this subject for men and another for women, or one law for the person advertising flour and another law for the person advertising a newspaper. A single sentence in a statute would cover the whole subject and it might read as follows: "Any person or corporation who shall make, print, expose in public or put in circulation any picture, photograph or likeness of another without his or her consent, shall be guilty of a misdemeanor." Such a law would clearly be general enough as all penal laws should be, but it is not so clear that it would be a wise law or one capable of enforcement. Indeed it is quite certain that it would operate in so many directions and cover so many cases that the law-makers never thought or heard of that it would have to be repealed at the next session. The right of privacy in the sense conveyed by the criticism upon the decision referred to is such an intangible thing and conveys such a vague idea that it is very doubtful if the law can ever deal with it in any reasonable or practical way. The social contract that secures to the individual so many things that contribute to the enjoyment of life imposes some penalties upon him which are inherent in the structure of society and in the character of the race. The wise man will bear them all with patience, good humor and good sense. No

one in these days can build for himself a lodge in some vast wilderness where he can avoid all contact with his fellow men and be free from the intrusion that is borne of the desire to gratify curiosity. He cannot, if he would, escape the camera or the kodak. If concealment were possible it would, instead of adding anything to his happiness, aggravate his misery. Oglers or those who stare and gaze at people in the streets, in theatres and public places, in defiance of decency and good breeding, are offensive, but it is wiser to permit the police to order them to move on than to attempt to regulate their conduct by statute. The artist who by the use of modern appliances is enabled in a moment of time to secure a likeness of a man or woman for some purpose of his own may be impertinent, but it is not so certain that it would be wise to enact a penal statute to punish him for such an act or to empower the courts to grant an injunction to prevent it.

There is one historical character who managed to secure and enjoy the right of privacy in its full perfection. No human being was permitted to disturb the solitude and seclusion of Alexander Selkirk. But a gifted poet has put into his mouth a vivid description of the imaginary joys and real sorrows of such a situation in lines that have become immortal. Our modern life is rushing, aggressive and material. Every discovery of science and every device of inventive genius is harnessed to the car of commercial utility. In the struggle for existence and success in every field of activity the sensitive individual may be said to "dwell in the midst of alarms," but that is better and more tolerable than to reign in some "horrible place," secure from all intrusion or publicity, remote from the eyes of the curious and safely secluded from the searching and deadly aim of the camera. The commercial instinct has so completely possessed itself of every avenue of life that there is but little room left for those that would escape from the publicity that is born of its pushing and aggressive spirit. It is not at all likely that many people would be at the trouble or expense of making or circulating pictures of a President or a great financier or a young lady unless they could thereby in some way promote their own interests or contribute to their own happiness. The commercial and

money-making spirit of the age in every department of human exertion may have adopted methods that offend the sensitive and shock the general sense of propriety, but when courts or legislators attempt to meddle with such things it often happens that they do more harm than good. If it be true, as suggested in the article quoted, that the decision there referred to "excited as much amazement among lawyers and jurists as among the promiscuous lay public," it is not only possible but probable that such a view was not founded upon a careful study of the question, but the result of a mere superficial impression. The concrete question before the Court was whether the act of which the plaintiff complained was within the jurisdiction of equity, or, to be more specific, whether a court of equity could legally or properly award a perpetual injunction against the further use of the photograph. If, in view of what has been said and what has been decided, the Court had held that such a complaint came within the domain of equity jurisdiction, it cannot be doubted that the decision would have been exposed to criticism upon much more solid and substantial ground. That the legislature has the power to make a law which the Court refused to make is not questioned, and what has been said here is intended only to point out some of the difficulties in the path of the legislator seeking to formulate a statute on the subject that would operate within the bounds of reason and justice. If the Court could or should have extended the remedy by injunction to such cases, then surely there is nothing in the way of the legislature.

The press is a great educator of the people, and its discussion of questions of law decided by the courts is often productive of much good. It is perhaps better that judicial decisions should be publicly discussed, even though the comments are unfair or misleading, than that they should be entirely ignored. Any argument to show that the decision which is criticised in the article quoted from is contrary to settled principles or a departure from precedent would be useful, but really all that has been said or can be said about it comes to this: the Court should have thrown principle and precedent to the wind and laid down an arbitrary rule applicable to that particular case without

regard to the effect of such a rule on other cases where perhaps the facts might be slightly different. Such decisions generally tend only to confuse the law. When a court embarks in the business of making new law to suit a particular case it is difficult to stop, as one decision generally furnishes an argument for another. It is easy enough to wander away from beaten paths that are safe, but it is not always so easy to return. The argument *ad hominem* is often a taking one, but it more frequently misleads than clarifies the mind and is generally made use of as a last resort. Hence it is suggested that had the plaintiff in the case referred to been the daughter of the judge the decision might have been the other way. That argument doubtless has some weight with the "promiscuous lay public" although it really imputes to the judges rather a low standard of integrity since it contains the suggestion that their decisions may be controlled by their private interests or personal affections. There is of course no intention to convey any such idea. It is only an obvious defect in methods of reasoning. What may be imagined that a judge would or would not do if his daughter's case could come before him, even if such a thing were possible, is not pertinent in any enquiry as to what the law actually is on any particular question, since law does not proceed from the private feelings of the judge. It may be unusual to make use of an article in a public journal as the text for a few thoughts upon a question that has assumed some interest to the bar and to students of the law, and it is not from any disposition to find fault with the article itself or to object to the most general discussion of a question which the Court passed upon according to the best lights that it had, that the comment of a public journal is here referred to, but for the simple reason that it embodies in convenient form and in clear language most if not all that has been or can be said with respect to the decision.

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